

The Honorable James P. Donohue

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

BIOPURE HEALING PRODUCTS, LLC

Plaintiff

V.

WELLNX LIFE SCIENCES, INC. and
PLATINUM US DISTRIBUTION, INC. d/b/a
WELLNX LIFE SCIENCES, USA

Defendants

CIVIL ACTION NO.:
2:17-cv-00470-RSL-JPD

**DEFENDANTS' SUBMISSION IN
SUPPORT OF REQUEST FOR BOND IN
THE AMOUNT OF \$474,400 USD**

1 **TO THE HONORABLE MAGISTRATE JUDGE:**

2 Defendants WellNX Life Sciences, Inc. and Platinum Distribution, Inc. d/b/a WellNX
 3 Life Sciences, USA (collectively, “Defendants” or “WellNX”), through their undersigned
 4 counsel, hereby respectfully provide this Submission in Support of Request for Bond in the
 5 Amount of \$474,400.00 USD.

6 **I. INTRODUCTION**

7 In order to comply with the Preliminary Injunction (Dkt No. 58), Defendants will incur
 8 out-of-pocket costs in the amount of \$474,000 USD to re-label and repackage approximately
 9 200,000 units of existing inventory. Under the applicable law in this Circuit, Plaintiff BioPure
 10 Healing Products, LLC (“BHP”) must be required to post a bond in that amount. *See, e.g.,*
 11 *LifeScan, Inc. v. Shasta Techs., LLC*, 2013 U.S. Dist. LEXIS 88489 (N.D. Cal. June 23, 2013)
 12 (“The Court concludes that a bond should compensate Defendants both for the costs of changing
 13 the packaging advertisements at issue and for any profits lost as a result of the injunction.”).

14 In assessing the amount of the bond, the Court must consider evidence of the financial
 15 ramifications of entering a preliminary injunction. *Masters Software, Inc. v. Discovery*
 16 *Communs., Inc.*, 725 F. Supp. 2d 1294, 1308-1309 (W.D. Wash. 2010). Concurrently with this
 17 Submission, Defendants provide evidence of their actual, out-of-pocket costs to comply with the
 18 Preliminary Injunction. Defendants have approximately 200,000 units of existing inventory with
 19 the “BioPure” name on the bottle labels and packaging. It cannot be disputed that the
 20 Preliminary Injunction will cause Defendants to incur out-of-pocket costs to re-label and
 21 repackage their existing inventory. As described in the declaration of Dana Johnson filed
 22 concurrently herewith, those costs will total \$474,000 USD. Consequently, Defendants hereby
 23 request that the Court issue a bond in the amount of \$474,400 USD in order to ensure that
 24 Defendants are fairly compensated for their hardship and costs of complying with Preliminary
 25 Injunction should they ultimately prevail on the merits in this matter.

26 **II. RELEVANT FACTS**

27 In an Order dated August 24, 2017, Judge Lasnick, after considering, among other things,

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1 the submissions of the parties in connection with Plaintiff's Motion for Preliminary Injunction
 2 (*Docket Entry Nos. 20-22, 40-43, 48*), along with the Report and Recommendation of the
 3 Honorable James P. Donohue (*Docket Entry No. 49*) (hereinafter, "7/6 R&R"), as well as
 4 Defendants' Objections thereto (*Docket Entry No. 54*), granted Plaintiff's Motion for Preliminary
 5 Injunction (*Docket Entry No. 58*) (hereinafter, "8/24 PI Order").

6 The 8/24 PI Order preliminarily enjoined WellNX, effective thirty (30) days from the
 7 date of the 8/24 PI Order (i.e., by September 23, 2017).¹ Compliance with the Preliminary
 8 Injunction will cause Defendants to suffer substantial harm and out-of-pocket costs. As detailed
 9 in the Declaration of Dana Johnson ("Johnson Decl.") filed concurrently herewith, Defendants
 10 have approximately 200,000 units of inventory of SLIMQUICK® Pure Products² with the
 11 BioPure green tea™ designation on the label and package remaining on hand. Johnson Decl. at
 12 ¶3. In order to comply with the Preliminary Injunction, Wellnx is required to re-label and re-box
 13 those 200,000 units. That process requires buying new bottles (as the process of removing the
 14 label, essentially, renders the old bottles useless), new labels and new boxes. *Id.* These hard
 15 costs and labor are as follows:

- 16 1) Costs of existing bottles, labels, and packages that must be destroyed (\$86,000);
 17 2) Costs of new bottles, labels and packages (\$86,000);
 18 3) Labor costs to un-package and repackage the inventory (\$182,000);
 19 4) Third-party vendor overage charges (\$70,400); and
 20 5) Costs of excess labels, bottles, and packaging that were to be used to package and label

22 ¹ The 8/24 PI Order enjoins WellNX from: "[u]sing 'BioPure' or any term or mark confusingly similar to
 23 'Bio Pure', in connection with the advertisement, promotion, distribution, offering for sale or selling of any goods or
 24 services involving or relating to tea, including without limitation the use of 'BioPure' in connection with the green
 25 tea ingredient of SlimQuick Pure products" and "[p]erforming any acts or using any trademarks, names, words,
 26 images or phrases that are likely to cause confusion, to cause mistake, to deceive or otherwise mislead the trade or
 public into believing that plaintiff or any authorized user of the BIOPURE Mark and defendants are one and the
 same or are in some way connected or that plaintiff is a sponsor of defendants or that the goods or services of
 defendants originate with plaintiff or any authorized user of the BIOPURE Mark or are likely to lead the trade or
 public to associate defendants with plaintiff" (hereinafter, "Preliminary Injunction").

27 ² All capitalized terms, unless otherwise indicated, shall be given the definition set forth in Defendants'
 28 Opposition to Plaintiff's Motion for Preliminary Injunction. *Docket Entry No. 40*.

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1 products, but now must be destroyed. *See* Johnson Decl. at ¶¶4-8 and Exhibits A-B. The total
 2 amount of these out-of-pocket costs to comply with the Preliminary Injunction is \$474,400 USD.
 3 *Id.* at ¶8.

4 Per the 7/6 R&R, WellNX conferred with Plaintiff BHP regarding the harm that WellNX
 5 will suffer as a result of the Preliminary Injunction and the appropriate bond; however, the
 6 parties have been unable to reach an agreement on the monetary value of the bond.

7 III. ARGUMENT

8 A. Legal Standard for Issuance of Bonds

9 Under Federal Rule of Civil Procedure 65(c), a court is empowered to issue a preliminary
 10 injunction, but only so long as “the movant gives security in an amount that the court considers
 11 proper to pay the costs and damages sustained by any party found to have been wrongfully
 12 enjoined or restrained.” In setting the appropriate amount of security, a court has “wide
 13 discretion”. *Masters Software, Inc. v. Discovery Communs., Inc.*, 725 F. Supp. 2d 1294, 1308
 14 (W.D. Wash. 2010). However, “the court must consider evidence of the ‘potential financial
 15 ramifications of entering a preliminary injunction.’” *Id.* at 1308-1309, quoting *Walczak v. EPL*
 16 *Prolong, Inc.*, 198 F.3d 725, 733 (9th Cir. 1999).

17 B. Defendants Will Suffer Substantial Harm and Out-of-Pocket Costs as a 18 Result of the Wrongfully Issued Preliminary Injunction

19 In assessing the proper bond amount in cases involving claims of intellectual property
 20 infringement, and particularly in the trademark infringement context, courts within the Ninth
 21 Circuit have considered the following factors, among others: the defendant’s tangible costs
 22 incurred as a result of the injunction, including, without limitation, the costs of re-branding
 23 and/or a change in name, the design and creation of new advertising and packaging, and the
 24 shipment and storage of new and remaining inventory; defendant’s investment in its brand and/or
 25 product; and defendant’s lost sales resulting from the issuance of the injunction. *See, e.g.*,
 26 *LifeScan, Inc. v. Shasta Techs., LLC*, 2013 U.S. Dist. LEXIS 88489 (N.D. Cal. June 23, 2013)
 27 (“The Court concludes that a bond should compensate Defendants both for the costs of changing

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the packaging advertisements at issue and for any profits lost as a result of the injunction.”); *Well Care Pharmacy II, LLC v. W' Care, LLC*, No. 2:13-cv-00540-GMN-VCF, 2013 U.S. Dist. LEXIS 89771 (D. Nev. June 24, 2013) (in amount of bond, the court considered that defendants would be required to re-brand its store with a new name and incur costs associated with replacing signage, along with expenditures on advertising); and *Moroccanoil, Inc. v. Zotos Int'l, Inc.*, 230 F. Supp. 3d 1161 (C.D. Cal. 2017) (Court considered the tangible costs that the defendant would incur as a result of the preliminary injunction, including “costs to (a) ship its product currently in. . . stores and distribution centers, and (b) store current. . . products that could potentially be resold.”); *see also Cybermedia, Inc. v. Symantec Corp.*, 19 F. Supp. 2d 1070, 1079-80 (N.D. Cal. 1998) (a computer software copyright infringement action wherein the court considered the profits that defendants would have earned on sales during the period of the injunction; out-of-pocket expenses related to promotion of the defendant's infringing product; damage to defendants' reputation; and expenses associated with the recall of the infringing product).

Here, Defendants have provided tangible evidence in support of the out-of-pocket costs that they will incur to comply with the Preliminary Injunction. *See generally* Johnson Decl. Specifically, Wellnx will be required to re-label and re-box 200,000 units of existing inventory. Johnson Decl. at ¶3. That process requires buying new bottles (as the process of removing the label, essentially, renders the old bottles useless), new labels and new boxes. *Id.* The total amount of Defendants' out-of-pocket costs to comply with the Preliminary Injunction is \$474,400 USD. *See* Johnson Decl. at ¶¶4-8; Exs. A-B. Accordingly, the bond amount must include the Defendants' costs of the injunction. *See, e.g., Korum Auto. Grp., Inc. v. Salstrom Motors Inc.*, No. CV11-5690BHS, 2012 WL 135414, at *4 (W.D. Wash. Jan. 17, 2012) (ordering \$100,000 bond to cover “the expenses Defendants are likely to incur in complying with this injunction”). For instance, in *CytoSport, Inc. v. Vital Pharm., Inc.* the court considered similar compliance costs for a company to repackage and dispose of its current inventory of dietary supplement products and set the bond at \$500,000. *CytoSport, Inc. v. Vital Pharm., Inc.*, 617 F. Supp. 2d 1051 (E.D. Cal. 2009).

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1 Additionally, a bond in the amount of \$474,400 USD is not only appropriate in light of
 2 the evidence of Defendants' out-of-pocket costs, but also is commensurate with bonds that have
 3 been ordered in other intellectual property cases in this Circuit. *See, e.g., Topline Corp.*, 2007
 4 U.S. Dist. LEXIS 58983 (court ordered posting of \$1 million bond); *OTR Wheel Eng'g, Inc. v.*
 5 *W. Worldwide Servs.*, No. CV-14-085-LRS, 2014 U.S. Dist. LEXIS 67634 (E.D. Wash. May 14,
 6 2014) (\$1.8 million bond); *LifeScan, Inc.*, 2013 U.S. Dist. LEXIS (\$3,684,776 bond); *see also*
 7 *Cybermedia, Inc.*, 19 F. Supp. 2d 1070 (\$ 1.63 million bond). In sum, it is clear that the bond
 8 Defendants seek is just and proper under the circumstances of this case, particularly given the
 9 evidence on the record, as well as the evidence submitted herewith.

10 **IV. CONCLUSION**

11 For the foregoing reasons, Defendants respectfully submit that Plaintiff should be
 12 required to post a bond in the amount of \$474,400 USD in light of the harm and out-of-pocket
 13 costs that Defendants will suffer as a result of the issuance of the Preliminary Injunction.

15 Dated: September 7, 2017

Respectfully submitted,

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on September 7, 2017, I caused the foregoing document to be filed
3 with the Clerk of the Court via the CM/ECF system, which will send notification of such filing to
4 the following counsel of record:

5 Marc C. Levy: MarcL@SeedIP.com

6 Thomas Shewmake: TomShewmake@SeedIP.com

7 Dated: September 7, 2017

8 BY: /s/ Stephen J. Kennedy
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